BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

NOTICE: This is an electronic bench opinion which has not been verified as official.

DATE: May 25, 1999

CASE NO: 1998-INA-0004
In the Matter of:

ENRIQUE and ADRIANA VIANO
Employer,

On Behalf of:

LETICIA CEJA
Alien

Appearance: Dan E. Korenberg, Esq.
Encino, California
for the Employer and the Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Holmes, Lawson and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Leticia Ceja ("Alien") filed by Employer Enrique and Adriana Viano ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such

labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On March 2, 1996, the Employer filed an application for labor certification to enable the Alien to fill the position of Domestic Cook in her home in Sun Valley, California.

The duties of the job offered were described as follows:

> "Plan, prepare, and cook meals in private home, and serve formal dinners. He/She will: plan menu according to employers suggestions; shop for food items and maintain refrigerator well stocked; peel, wash, trim prepare vegetables, meats, breads, soups and desserts; clean kitchen and maintain kitchen area clean and orderly; wash dishes, pots and pans and other utensils; serve formal meals following normal etiquette; serve drings(sic) and refreshments; prepare low sodium, low cholesterol, therapeutic family lunches and dinners. When employer entertains, prepare continental, aesthetically pleasing foods."

No education and two years experience in the job were required. Special requirement was "prepare low sodium, low cholesterol meals. Must be able to prepare fancy dishes. Work schedule: Wed. Thru Sun. 8:00-10:30 a.m. & 3:30 p.m.- 9:00 p.m. (Mon. & Tues. Off)". Wages were $12.00 per hour. (AF-225-269)

On March 26, 1996, the (Acting) CO issued a NOF denying certification, finding that the job offer was not bona fide, did not establish full time employment and not clearly open to U.S. workers. Compliance by Employer would require documentation of(summarized): who previously performed the duties; number and length of meals prepared daily and weekly; if need includes entertainment, prior and current schedule of same for the prior

year; frequency of cooking and any duties other than cooking; schedule and care of children; who will perform household duties. The CO also required documentation of Employer's ability to pay. Thirdly, the CO found absent documentation that the cooking for special diet was unduly restrictive and required documentation of same. Finally, the CO found Employer had rejected unlawfully a U.S. applicant and went into great detail to describe this rejection and the applicant's statements. (AF-215-223)

On April 22,1996, Employer through counsel forwarded an extensive rebuttal outlining the duties required, the allegation that Employers entertained guests including prospective clients, as well as specific schedule of cooking. With respect to who previously had performed cooking chores, Mrs. Viano stated:

> "The cooking duties have been performed by myself, my mother, Leticia Brighenti and also my two daughters, Leslie and Jennifer. However, the combination of the growth of my consulting business, my mother's advancing years and my daughters receipt of extra homework from school and increasing extracurricular activities, means that we simply do not have the time and energy to continue the tasks of cooking and desperately need a full time cook to undertake the responsibility of cooking and preparing food for a family of seven. I continue to work on my own business and at least twice a week work at my client's premises. My husband Enrique works full-time. Quite frankly, our need for a domestic cook existed even before I advertised the position, however, I held on until the stress of cooking for a family of seven was just too much."

Federal and state income tax returns were attached. Dietary needs were required for her parents. Employer also alleged that the U.S. applicant rejected, Ms. Warner, was only interested in obtaining a client for her catering business, and that Employer never stated to Ms. Warner that the hourly rate was only $10.00 as alleged by Ms. Warner in a questionnaire response. Finally, Employer alleged household duties were done by herself, her children and to a limited extent her parents. Employer contended that based upon the extensive daily food preparation, cooking and menu planning duties, along with frequent entertaining commitments that are the responsibility of the cook, the position constitutes full time employment. (AF-143-223)

On July 23, 1996, the CO issued its Final Determination denying certification based on a failure by Employer to demonstrate through documentation that the NOF was rebutted. After summarizing the NOF and Employer's arguments on rebuttal, the CO stated:

"(W)hereas only Mrs. Viano has been performing the cook duties until now, and she is employed both in and out of the home, it does not appear that the duties have yet been a forty hour per week position. The position is being newly created. The employer's wording that she held on to the position until the stress became too much is ambiguous where it appears to be in the past tense, but there is no indication that anyone has been hired or that anyone other than Mrs. Viano has performed the duties. The amount of entertainment claimed is not substantiated. The employer has not provided any specific information about the length of time required to prepare and bake breads and pastries. Where the petitioning employer seeks to hire a first domestic employee, it appears speculative that the hours required to perform the job will be as many as stated. Next, the employer will be required to spend more than one third of the family's income, actually close to on(e) half of the family's income, to pay the cook's salary, but this is a family that has five dependents, including three children, and it is not convincing that such a family, with no history of any domestic employee, would be able to follow through with such a full time salary offer. [$12 per hour x 40 hours= $480 per week, times 52 weeks = $24,900 per year]. The job duties as described do not appear convincing, and it appears that the position is being created for the alien. Thus we find that the employer's response fails to document that the employer has a bona fide, full-time opportunity for a domestic cook or that it is truly open to U.S. workers as described."

The CO proceeded to discuss the restrictive requirements after summarizing the NOF and employer's rebuttal on this issue:

"Where the Certifying Officer did not find cooking for special requirements restrictive, the C.O. found that an employer's requirement that the cook come into the job with previous experience cooking for the same special dietary requirements was restrictive. In support of this finding, the C.O. had pointed out that per the Dictionary of Occupational Titles, it appears that the domestic cook would follow the instructions of the employer concerning any special dietary requirements. Here the rebuttal contains no evidence whatsoever concerning any particular special difficulties, and the rebuttal skirts the issue raised entirely."

The CO's discussion of the U.S. applicant was as follows:

"It may not be possible to determine who is correct regarding the wage offer, but the employer affirms that Ms. Warner was not offered the job at any salary. But this

applicant had stated in her questionnaire response that she had been willing to accept the employer's terms. On the other hand, the employer has no convincing evidence that Ms. Warner could not have accepted the employer's terms even if Ms. Warner was still associated with her catering business. This is especially true where the employer offers a split shift, and the employer has not provided any information showing how Ms. Warner has any specific current clients whose needs cannot be met by others or during Ms. Warner's off hours. We also note that the employer indicates that she has been working as a bookkeeper while performing the cook duties herself; that she reports that it has been too stressful does not provide any basis to decline to offer this job to a cook who may or may not have other cooking assignments. Finally, the employer's remarks about Ms. Warner's references do not document that she lacks the required amount of professional cooking experience or what is deficient about her cooking experience. Gencorp (87-INA-659)(Jan. 13, 1988)(en banc)." (AF-137-142)

On August 16, 1996, Employer requested review of the Final Determination by this Board. (AF-2-136).

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp.,1988-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 1992-INA-321 (Aug. 4, 1993).

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. Gerata Systems America, Inc., 1988-INA-344 (Dec. 16, 1988).) Further, the burden of proof rests with the Employer to demonstrate by substantial evidence that the position is full time. Dr. Vladimar Levit,M.D.,1995-INA-00540 (July 15, 1997).

In the case of Carlos Uy III 1997-INA-304 (March 3, 1999)(en banc)the Board changed the focus of this analysis for "domestic cook" cases.. In Uy the Board focussed on the *bona fides* of the job opportunity contained in Section 656.20(c)(8) which is gauged by the "totality of the circumstances" test as borrowed from Modular Container Systems, Inc. 89-INA-228 (July 16, 1991)(en banc). The distinct approach to "private employer", particularly

cook cases, was announced as an introduction to discussion. The Board in Uy stated:

> "When an employer presents a labor certification application for a 'Domestic Cook', attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by the much higher experience requirement. Thus such an application raises the question of whether the employer is really seeking a housekeeper, nanny, companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States. One motive for categorizing a job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer under IMMACT 1990..."

This bold, forthright statement of potential for misuse if not actual abuse of the labor certification process was supported by extensive footnotes demonstrating statistically the infrequent and diminishing household use of domestic cooks in the United States with a concurrent rise in labor certification applications in this job opportunity. The Board went on to emphasize the necessity for the CO when she invokes lack of a *bona fide* job opportunity as a violation to have the NOF be clear, explicit and informative. Moreover, the Final Determination must clearly state the rationale and basis for its conclusion. The Board stated:

> "An employer's presentation of a position description for labor certification that, in some instances strains credulity does not relieve the CO from an obligation to review the employer's rebuttal documentation and to state in the Final Determination what aspects of that documentation are deficient...That said, it must be observed that if the CO's NOF provides an employer with adequate notice of the nature of the violation, the basis for the CO's challenge, and instructions for rebutting or curing the deficiencies, an employer's complaint about the brevity of the CO's Final Determination on appeal will not change the fact that it was Employer's burden on rebuttal to produce sufficient evidence to show entitlement to labor certification. *See Top Sewing, Inc. And Columbia Sportswear*, 1995-INA-563 and 1996-INA-38 (Jan. 28, 1997)(*per curiam*). Thus, the Board would not rule out affirming a denial of labor certification even in the absence of a fully reasoned Final Determination if the NOF provided adequate notice, and the employer's documentation

was so lacking in persuasiveness that labor certification would be precluded."

In a footnote quoting from Stephens v. Heckler, 766 F 2d 284 (7th Cir. 1985) the Board noted generally, that "..public good is not necessarily served by an appellate body that demands perfection in the processing of a claim."

We believe this is such a case. We find that the CO's NOF was sufficiently clear in what was allegedly not *bona fide* in the application and what documentation was required to remedy the apparent deficiencies and that the CO was clear in the Final Determination as to why the employer's rebuttal was not sufficient.

The application of the totality of circumstance test by its very nature presupposes a certain amount of inevitable subjective determinations to be made by the CO and will rarely if ever, be "perfectly" articulated in the NOF or the Final Determination. While we have the same concerns expressed in Judge Lawson's concurring opinion in Uy that due process be extended to Employers to the fullest extent that is reasonable and possible, we note that the labor certification process does not warrant the application of formal judicial proceedings that might be required in another context. Similarly, we share a concern expressed by Judge Huddleston in a concurring opinion in Uy of the difficulty of application of the totality of circumstances test in domestic cook cases, primarily since the job duties and schedule are speculative and subject to employer's pronouncements. Notwithstanding its limitations, we find the test is particularly suited to the area of private employment and specifically domestic cook cases. We emphasize that Uy was not intended to expand use of the test beyond these cases.

We believe the facts here though very similar to Uy, are sufficiently distinguishable so that a finding affirming the CO is appropriate. We are particularly impressed by the guidelines set out in Uy (D & O, pp. 10-12) as they are applied to this case as well as the extensive explanations of the CO that track those guidelines. A first criteria looked at in the totality of circumstances test is the percentage of the employer's disposable income that will be devoted to paying the cook's salary. As clearly stated by the CO, that percentage is between 33 and 50, a *prima facie* excessive amount made less credible by the need to support seven family members with no other given outside income. (Tax returns did show outside rental properties, which, however, showed taxable losses and would not appear to provide additional income). Another indicia in Uy was whether the Employer has retained cooks in the past. While not given lengthy analysis by the CO, she did note that employer had previously had cooking done by the Employer's mother, herself and her two daughters, and

the excuses given for not continuing this arrangement were not persuasive. We agree, particularly in light of the financial burden it would place on the large extended family. “Special circumstances” such as dietary needs are made more credible, the Board found in Uy, if supported by objective documentation. Here, no such documentation, such as a physician’s statement, has been proffered. While Employer alleges the mother and father-in-law are “elderly” no documentation was presented. Under the other circumstances of the case as found by the CO, the special dietary requirement of “low sodium, low cholesterol meals” is suggestive of a restrictive requirement aimed at making availability of U.S. applicants more difficult. Further, no credible evidence has been introduced that alien had experience in cooking such meals. Her only stated prior cooking experience was for a family in her native Mexico, which country’s cooking is not noted for being low in cholesterol. While not specifically stated by the CO, alien’s prior experience apparently began at age 19 and ended at 22 and was not verified as to whether it was full-time.

We, also, find the CO correct in noting that Employers’ schedule of entertaining was not well documented.

Similarly, the CO, while not deciding the matter only on the refusal to hire the U.S. applicant, Ms. Warner, did note that she was not offered the job at any salary. The controversy between the interview as set out by Ms. Warner as opposed to Employer need not be resolved as to exact truthfulness. However, it is clear that Employer was not overly enthusiastic in attempting to employ Ms. Warner and appeared to give reasons that were not lawful. While we do not reach the issue of whether a denial of certification on the basis of unlawful rejection of a U.S. applicant alone would be appropriate, the circumstances surrounding the rejection of the applicant undermine the *bona fides* of the job offer.

In summary, we find the criteria as set out in Uy are met in this case. Indeed, it could be considered a “roadmap” for the application of the “totality of circumstances” test. While the application for a domestic cook is not proven to not be full-time, looking at the totality of the circumstances surrounding the application, we believe the CO properly rejected labor certification with adequate explanation in tne Final Determination, and the CO provided specific reasons for finding the application to not present a *bona fide* job opportunity and for finding the documentation submitted in response to the NOF to be deficient. The wisdom of shifting the main emphasis in determining these cases from full-time employment to a totality of circumstances is confirmed here, while the pitfalls inherent in such a test are also demonstrated.

As a final matter, we are cognizant of the difference between skilled and unskilled labor in obtaining labor certification which the Board noted in Uy. As stated above labor certification is available where there are not able, willing and qualified U.S. applicants. Statistics clearly demonstrate, however, even in cases where the job offered is unquestionably genuine, a high incidence of aliens moving from the job on which labor certification was granted to another job within a very short period of time. It is, also, common experience that in "domestic cook" cases, the number of U.S. applicants is often low or non-existent. However, if labor certification is granted in these cases where a job does not realistically exist or where the alien, with foreknowledge or the natural turn of events, abandons the job opportunity on which labor certification was granted, such individual will then be in direct competition with U.S. workers at the unskilled job level at cross-purposes with the Act. One of the purposes of the labor certification process is to upgrade the U.S. worker skill level to enable employers to compete in an increasingly competitive world market. This purpose is not easily fulfilled where the process is clogged by suspect applications for private employment, particularly domestic cooks. Close scrutiny of such suspect applications is appropriate under the totality of circumstances test set forth in Uy.

ORDER

The Certifying Officer's Denial of Certification is affirmed.

For the Panel

_____
JOHN C. HOLMES
Administrative Law Judge

Administrative Law Judge Lawson concurring

I concur in the result and in the analysis under the doctrine of the Uy case although I find such analysis unnecessary since the CO herein did not predicate the denial on the hours of employment alone, having correctly found adversely on the issues of sufficiency of family income to sustain employment, absence of

business necessity for experience cooking for special diets, and unlawful rejection of a qualified U.S. applicant in failing to make a job offer. (AF-23-25). I also find extraneous the reference and apologia in regard to due process at page 7 of the decision since it does not disclose a due process question and no palpable due process claim has been raised. My concurring opinion in Uy addressed the due process question in regard to the majority raising an NOF issue which had been resolved by omission from the FD. The request for review herein grounds its due process argument on the claims that the "additional request for evidence never presented in the original NOF is the length and time required to prepare bake breads and pastries" and that "failure by the CO to address all parts of the meticulously detailed letter from the employer is a grave denial of due process." (AF 4-5) As to the first of these claims, the FD contains no additional request for evidence, but merely commentary on the sufficiency of the evidence presented. As to the second, it is unnecessary and unreasonable to require the FD to address all parts of the meticulously detailed letter so long as the substance is considered and decided, as it was. The due process claims are specious.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **Alice M. Synnott (Claudia Olivera)**

Case No. : 95-INA-235

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: